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\*ADMITTED IN DC ONLY

October 10, 2015

**VIA ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: WC Docket No. 12-375 - Global Tel\*Link Corporation – Written *Ex Parte* Presentation**

Dear Secretary Dortch:

Global Tel\*Link Corporation (“GTL”), through its counsel, hereby respectfully submits the following information in response to the inmate calling service (“ICS”) reforms recently proposed by Chairman Wheeler and Commissioner Clyburn for adoption by the Federal Communications Commission (“FCC”) at its monthly agenda meeting on October 22, 2015 (the “FCC Proposal”).<sup>1</sup>

As explained in more detail below, the FCC Proposal would reduce all ICS rates to levels that are not supported by the record cost data and will not ensure fair compensation for ICS

<sup>1</sup> FACT SHEET: Ensuring Just, Reasonable, and Fair Rates for Inmate Calling Services (rel. Sept. 30, 2015) (the “FCC Proposal”), available at <https://www.fcc.gov/document/fact-sheet-ensuring-just-reasonable-fair-rates-inmate-calling>; see also *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107 (2013) (“*ICS Order and First FNPRM*”), *pets. for stay granted in part sub nom. Securus Tech., Inc. v. FCC*, No. 13-1280 (D.C. Cir. Jan. 13, 2014), *pets. for review pending sub nom. Securus Tech., Inc. v. FCC*, No. 13-1280 (D.C. Cir. filed Nov. 14, 2013) (and consolidated cases); *Rates for Interstate Inmate Calling Services*, 29 FCC Rcd 13170 (2014) (“*Second ICS FNPRM*”).

providers as required by law. The proposed rate caps also would not achieve the FCC's goal of "market-based" ICS reform or the FCC's legislative mandates, and would radically reduce or eliminate the availability of important ICS security features and undercut GTL's ability to offer new technologies and innovative services for inmates and correctional facilities. Further, the FCC Proposal would not provide a rational implementation schedule that recognizes the reality of the commercial ICS marketplace and the need for ICS providers to renegotiate hundreds of contracts.<sup>2</sup>

By contrast, the Joint Provider Reform Proposal<sup>3</sup> is designed to achieve the FCC's goals of implementing "comprehensive, permanent ICS reforms" that rely on a market-based approach to encourage competition in order to reduce rates and to ensure fair ICS compensation.<sup>4</sup> The FCC Proposal should be revised to reflect the three intertwined components of the Joint Provider Reform Proposal: (1) establish non-tiered backstop rate caps for all ICS rates that provide for rate flexibility, recognize the individualized nature of ICS contracts, and allow for the deployment of new technologies in the correctional setting; (2) replace the existing system of site commissions with a defined, admin-support payment that reflects legitimate correctional institution costs and is recovered through an additive to the per-minute ICS rate; and (3) agree to support a uniform, industry-defined list of capped ancillary charges. The Joint Provider Reform Proposal better addresses the interests of all stakeholders because it promotes market-based ICS rates, allows for sufficient return on investment to promote broadband services and new technologies, ensures fair compensation for ICS providers, assures cost recovery for correctional facilities, and permits facilities to continue to receive services based on their individual needs.

## **I. THE PROPOSED RATE CAPS ARE CONTRARY TO THE RECORD, RATEMAKING LAW, THE INDIVIDUALIZED NATURE OF THE ICS MARKET, AND THE FCC'S STATUTORY OBLIGATIONS**

### **A. The Rate Caps Are Not Supported by the Record**

It appears that the proposed rate caps were established by taking the industry average costs per minute for each rate category established under the FCC Proposal, and then rounding up to the nearest penny.<sup>5</sup> GTL supports the use of industry average costs to establish rate caps

<sup>2</sup> See, e.g., WC Docket No. 12-375, Letter from Andrew D. Lipman (dated Oct. 5, 2015), *attaching* American Jail Association, AJAlert, "FCC proposed tiered ICS rates for jails; commissions allowed" (Oct. 2, 2015).

<sup>3</sup> WC Docket No. 12-375, Letter from Global Tel\*Link Corporation, Securus Technologies, Inc., and Telmate, LLC (dated Sept. 15, 2014) ("Joint Provider Reform Proposal"); see also WC Docket No. 12-375, Letter from Global Tel\*Link Corporation (dated Apr. 3, 2015) ("GTL April 3 Letter"); WC Docket No. 12-375, Letter from Global Tel\*Link Corporation (dated Sept. 2, 2015) ("GTL September 2 Letter"); WC Docket No. 12-375, Letter from Global Tel\*Link Corporation (dated Sept. 17, 2015); WC Docket No. 12-375, Letter from Global Tel\*Link Corporation (dated Sept. 23, 2015); WC Docket No. 12-375, Letter from Global Tel\*Link Corporation (dated Sept. 25, 2015) ("GTL September 25 Letter").

<sup>4</sup> *Second ICS FNPRM* ¶ 6.

<sup>5</sup> Stephen E. Siwek and Christopher C. Holt, Comments on Wheeler/Clyburn ICS Proposal, at 2 (dated Oct. 10, 2015) (attached hereto) ("Siwek/Holt Comments"). The rate categories under the FCC Proposal are broader than those utilized by the FCC in the mandatory data collection.

provided that such cost data is used to establish the contemplated *backstop rate caps* that would allow for rate flexibility and the development of “market-based” rates.<sup>6</sup> A rate regime without backstop rate caps does not accurately reflect the ICS industry, individual ICS providers, or individualized needs of correctional facilities, and undermines the FCC’s goal of market-based reform.<sup>7</sup>

The FCC *Second ICS FNPRM* proposed a “market-based approach;” the FCC Proposal, however, reverses course in favor of what appears to be a cost-based rate regime.<sup>8</sup> There is no basis in the record for adoption of cost-based rates (let alone rates not supported by the cost data) when the FCC explicitly said it was abandoning the “cost-based approach” adopted in the *ICS Order and First FNPRM* in favor of a market-based approach “to allow market forces to ensure that rates are just and reasonable.”<sup>9</sup>

A rate cap placed squarely at the industry average per-minute cost means that a significant portion of the ICS industry would face costs in excess of the proposed caps.<sup>10</sup> For example, if the FCC Proposal were adopted, approximately 40 percent (40%) of all debit/prepaid minutes of use would be provided at below-cost rates.<sup>11</sup> The same also is true within the rate “categories” established under the FCC Proposal. For instance, if adopted, approximately 88 percent (88%) of all debit/prepaid minutes of use in prisons with 5000 to 19,999 inmates would be provided at below-cost rates, and approximately 63 percent (63%) of all debit/prepaid minutes of use in jails with 1000 or more inmates would be provided at below-cost rates.<sup>12</sup>

By contrast, only five percent (5%) of all debit/prepaid minutes of use would be provided at below-cost rates utilizing the \$0.20 per minute debit/prepaid rate cap recommended by the

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<sup>6</sup> GTL September 2 Letter at 3, 8-9.

<sup>7</sup> *Price Cap Performance Review for Local Exchange Carriers*, 10 FCC Rcd 8961, ¶ 166 (1995) (using backstop mechanisms when a rate formula “might not prove to be perfectly accurate either for the [carrier] industry or for individual [carriers] or market conditions”); *see also 1992 Annual Access Tariff Filings*, 7 FCC Rcd 4731, ¶ 4 (1992) (implementing backstop measures “to ensure that the basic price cap adjustment formula produces a result fair to both ratepayers and carriers”); *Petition for Waiver of the Commission’s Rules to Recover Network Depreciation Costs*, 9 FCC Rcd 377, ¶ 24 (1993) (adopting a “‘backstop’ mechanism that provides an additional safeguard against rates that are unreasonably high or low”).

<sup>8</sup> *Price Cap Performance Review for AT&T*, 7 FCC Rcd 5322, ¶ 4 (1992) (cost-based or rate-of-return regulation, allows carriers “to set their rates based on the costs - investment and expense - of providing a service”).

<sup>9</sup> *Second ICS FNPRM* ¶¶ 6, 48.

<sup>10</sup> Siwek/Holt Comments at 3; *see also ICS Order and First FNPRM*, Pai Dissent at 120-21 (explaining that setting the rate cap based on average costs only means that a significant number of facilities will be capped at below-cost rates).

<sup>11</sup> Siwek/Holt Comments at 3 (based on 2013 minutes of use); *see also* WC Docket No. 12-375, Letter from Securus Technologies, Inc. (dated Oct. 7, 2015) (“the draft rate caps are significantly below Securus’s costs even without site commissions”).

<sup>12</sup> Siwek/Holt Comments at Table 2 and Appendix 1 (based on 2013 minutes of use); *see also* WC Docket No. 12-375, Letter from Pay Tel Communications, Inc. (dated Oct. 7, 2015) (explaining that the FCC Proposal rate cap for jails with more than 1000 inmates is below Pay Tel’s costs).

Joint Provider Reform Proposal,<sup>13</sup> and only three carriers representing 0.5 percent of the ICS market would face overall average costs above the this rate cap.<sup>14</sup> As previously demonstrated, the average overall debit/prepaid costs for 9 out of 12 ICS providers are below the Joint Provider Reform Proposal's backstop rate cap for debit/prepaid calls.<sup>15</sup> Importantly, the three (3) carriers with average costs above the Joint Provider Reform Proposal's backstop rate cap account for only 0.5 percent (0.5%) of all debit/prepaid minutes of use. The Joint Provider Reform Proposal's backstop rate cap for debit/prepaid calls represents an appropriate and reasonable industry-wide average rate that covers 99.5 percent (99.5%) of all debit/prepaid minutes of use reported by these ICS providers.

## **B. The FCC Proposal Is Contrary to Long-Standing Ratemaking Principles**

The FCC Proposal does not reflect well-established ratemaking requirements. FCC precedent holds that “rates must be based primarily on the cost of service, including a reasonable return on investment (*i.e.*, profit).”<sup>16</sup> The ratemaking process “involves a balancing of the investor and the consumer interests . . . the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business.”<sup>17</sup> A rate is confiscatory when it will “jeopardize the financial integrity of the companies, either leaving them insufficient operating capital or by impeding their ability to raise future capital,” or when the rate is “inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme.”<sup>18</sup> Review of whether a regulation is confiscatory considers the “total effect of the rate order,” when “viewed in its entirety.”<sup>19</sup> Regulated rates must allow the regulated entity to obtain a return on its investment “sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.”<sup>20</sup>

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<sup>13</sup> Siwek/Holt Comments at Table 2 and Appendix 1 (based on 2013 minutes of use). The Joint Provider Reform Proposal's backstop rate caps are \$0.20 per minute for all debit/prepaid calls and \$0.24 per minute for all collect calls. *See* Joint Provider Reform Proposal at 2.

<sup>14</sup> WC Docket No. 12-375, Letter from Global Tel\*Link Corporation (dated Aug. 10, 2015), *attaching* Stephen E. Siwek and Christopher C. Holt, Further Comments with Regard to Rate Cap Proposals (dated August 10, 2015) (“Siwek/Holt Further Comment on Rate Cap Proposals”).

<sup>15</sup> Siwek/Holt Further Comment on Rate Cap Proposals at 8 (Figure C).

<sup>16</sup> Letter filed by Andrew D. Lipman at 2 (dated Feb. 20, 2015); *Alabama Cable Telecomms. Ass'n v. Alabama Power Co.*, 16 FCC Rcd 12209, ¶ 51 (2001) (“if the end results of the regulations are ‘[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed’ then the regulations are constitutionally valid”) (citing *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944)); *see also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989).

<sup>17</sup> *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944).

<sup>18</sup> *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 312 (1989) (citing *Covington & Lexington Turnpike Road Co.*, 164 U.S. 578, 497 (1896)).

<sup>19</sup> *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) (internal citations omitted).

<sup>20</sup> *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).

The FCC cannot impose rates so low that ICS providers cannot possibly recover their costs<sup>21</sup> and cannot adopt rate regulation that effectively guarantees carriers an economic loss.<sup>22</sup> Setting rates at cost eliminates the ability of ICS providers to recover a reasonable return on their investment as required under the law.<sup>23</sup> More importantly, by failing to address site commissions, the FCC Proposal ignores a key part of the cost structure of ICS and what the FCC has termed “the single largest component affecting the rates for inmate calling service.”<sup>24</sup> Establishing rate caps based on cost data that excludes site commissions (thus not permitting ICS providers to recover the costs of site commission payments), while taking no action to modify the existing site commission regime, results in rates that are confiscatory.<sup>25</sup>

### **C. The Rate Caps Ignore Correctional Facilities’ Individualized Security and Communications Requirements**

The FCC long has recognized that “ICS providers generally offer their services pursuant to contracts with correctional facilities,” and these contracts vary by correctional facility.<sup>26</sup> The FCC Proposal leaves no room to meet the individual needs of the wide-variety of correctional facilities. Correctional facilities and providers, not regulators, are in the best position to define the scope of services,<sup>27</sup> which may be basic voice or broader security and communications services such as enhanced calling features, alerts/notifications, voicemail, and/or messaging.<sup>28</sup>

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<sup>21</sup> *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (finding the Fifth Amendment to the Constitution protects regulated entities from regulations that are “so unjust as to be confiscatory”); *see also* WC Docket No. 12-375, Letter from Andrew D. Lipman at 2-3 (dated Feb. 20, 2015); WC Docket No. 12-375, Letter from Andrew D. Lipman at 23-27 (dated July 21, 2015); WC Docket No. 12-375, Letter from Andrew D. Lipman at 8-10 (dated Oct. 7, 2015).

<sup>22</sup> *AT&T v. FCC*, 836 F.2d 1386, 1391-92 (D.C. Cir. 1988) (rejecting FCC rule that would “guarantee the regulated company an economic loss”); *see also* *Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968) (the “power to regulate is not a power to destroy”).

<sup>23</sup> WC Docket No. 12-375, Letter from Securus Technologies, Inc. (dated Oct. 7, 2015) (“Setting below-cost rates violates fundamental precepts of regulatory ratemaking. . .”).

<sup>24</sup> *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 17 FCC Rcd 3248, ¶ 10 (2002) (“2002 Remand Order”); *see also* *Rates for Interstate Inmate Calling Services*, 27 FCC Rcd 16629, ¶ 37 (2012) (“ICS NPRM”) (same); *ICS Order and First FNPRM* ¶ 41 (same).

<sup>25</sup> *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (finding the Fifth Amendment to the Constitution protects regulated entities from regulations that are “so unjust as to be confiscatory”); *see also* GTL September 25 Letter at 6-8.

<sup>26</sup> *ICS Order and First FNPRM* ¶ 21; *see also* *ICS NPRM* ¶¶ 5, 7 (discussing the awarding of ICS contracts and the differences in rates among facilities); *2002 Remand Order* ¶¶ 10-11 (discussing the ICS contract award process and varying rates).

<sup>27</sup> GTL January 2015 Comments at 13-14 (explaining that adoption of a single set of rate caps for all correctional facilities allows the parties with the most knowledge about the correctional facility - correctional officials and the ICS provider - to determine the appropriate rates for ICS at the particular facility based on the security needs of that facility).

<sup>28</sup> *See, e.g.*, Idaho Department of Correction November 2014 Comments at 1-2 (discussing inmate response to the new enhanced services being offered, including voicemail); *see also* Prison Policy Initiative January 2015 Advanced Services Comments at 1-2 (recognizing the “value” advanced inmate communications services can

Rate and service flexibility is a natural outgrowth of a backstop rate cap regime - the rate cap regime eliminates the “danger that [carriers] would charge unreasonably high prices” while providing carriers “with the pricing flexibility that would encourage innovation.”<sup>29</sup> The “primary objective” of a rate cap regime is “protecting ratepayers against unreasonable charges for services” and “giving carriers both the flexibility to introduce new, innovative services quickly and to provide the most efficient mix of services their networks permit and the incentive to do so.”<sup>30</sup> “[P]ermitting flexibility in price-setting generates economic efficiencies that benefit ratepayers through lower rates.”<sup>31</sup> A fluid rate cap regime provides “flexibility in light of existing market conditions, while protecting against anti-competitive, unreasonably discriminatory or other negative consequences.”<sup>32</sup> Without such flexibility, carriers would be limited in their “ability to respond in a timely manner to their customers’ demands for innovative service arrangements tailored to each customer’s individualized needs . . . . The better policy for consumers is to allow [carriers] to respond to technological and market developments.”<sup>33</sup> The rate caps in the FCC Proposal eliminate the rate flexibility ICS providers require to respond to market conditions and the specific security and communications needs of correctional facilities.

#### **D. The Proposed Rate Caps Conflict with the FCC’s Statutory Mandates to Promote the Deployment of Broadband and Advanced Services**

The FCC Proposal abandons a market-based approach to ICS rates, which will radically reduce or eliminate the ability of ICS providers to offer new technologies to inmates. This directly conflicts with the FCC’s legislative mandates. The FCC has a statutory obligation to adopt rules and policies that support the deployment of broadband technology and advanced services to all Americans.<sup>34</sup> The FCC repeatedly has said that its “end goal is to ensure the

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provide to inmates and their families, such as offering additional and timelier methods of communication and noting that the nascent technologies offered by ICS providers address “a real need” and provide “a more flexible approach to communication”).

<sup>29</sup> *Amendment of Part 69 of the Commission’s Rules Relating to the Creation of Access Charge Sub-Elements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers*, 7 FCC Rcd 5235, ¶ 17 (1992); *see also* GTL April 3 Letter at 19-20 (explaining the need for ICS rate caps to be set at appropriate levels to encourage innovation and the deployment of new technologies).

<sup>30</sup> *Policy and Rules Concerning Rates for Dominant Carriers*, 2 FCC Rcd 5208, ¶ 47 (1987).

<sup>31</sup> *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, ¶ 35 (1990).

<sup>32</sup> *Price Cap Performance Review for Local Exchange Carriers*, 11 FCC Rcd 858, ¶ 61 (1995).

<sup>33</sup> *Petition of the Embarq Local Operating Companies for Forbearance under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common Carriage Requirements*, 22 FCC Rcd 19478, ¶ 32 (2007) (discussing the disadvantages of dominant carrier regulation of rates).

<sup>34</sup> *See, e.g.*, 47 U.S.C. § 157(a) (“It shall be the policy of the United States to encourage the provision of new technologies and services to the public.”); 47 U.S.C. § 230(a), (b) (noting the benefits of Internet and interactive computer services and establishing it as “the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media”); 47 U.S.C. § 254(b)(2) (stating the FCC shall base its policies on the principle that “[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation”); 47 U.S.C. § 1301, 1302 (finding that “deployment and

ubiquitous and affordable availability of broadband for all Americans” and that broadband is a “top priority” at the FCC.<sup>35</sup> Adoption of the FCC Proposal flies in the face of the FCC’s broadband deployment goals, and is counter to the FCC’s previous actions to take “significant steps to better enable the private sector to deploy broadband facilities to all Americans.”<sup>36</sup>

The FCC has determined that making new technologies available in correctional settings will “offer improvements and innovations that benefit users and thus serve [the FCC’s] goals for ICS reform.”<sup>37</sup> Numerous governmental and private reports support the FCC’s findings that inmate access to new communications technology advances core correctional goals such as fighting recidivism and preparing inmates for reentry into society by, *inter alia*, encouraging increased contact with family members and promoting education.<sup>38</sup> According to one such report, in addition to connecting incarcerated individuals with supportive friends and family members, real-time interactive video communication achieves additional correctional objectives, including reducing costs, improving safety and security, providing flexibility in scheduling

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adoption of broadband technology is vital” and stating the FCC “shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans”).

<sup>35</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment pursuant to Section 706 of the Telecommunications Act of 1996*, 23 FCC Rcd 9615, ¶ 76 (2008); Letter from Chairman Wheeler to the Honorable Jim Bridenstine (Apr. 9, 2015) (“expanding high-speed broadband to all corners of the country is a top priority for the Commission”); *see also* Remarks of Commissioner Mignon L. Clyburn, “Realizing Broadband’s Grand Promise for Consumer Health IT” (Sept. 15, 2014) (“broadband in and of itself is not the goal, it is about what broadband enables”).

<sup>36</sup> *Connect America Fund, et al.*, 26 FCC Rcd 17663, ¶ 5 (2011) (“extending and accelerating fixed and mobile broadband deployment has been one of the Commission’s top priorities over the past few years” by taking “a series of significant steps to better enable the private sector to deploy broadband facilities to all Americans”).

<sup>37</sup> *Second ICS FNPRM* ¶ 145.

<sup>38</sup> *See, e.g.*, Allison Hollihan, Michelle Portlock, National Institute of Corrections, Osborne Association, *Video Visiting in Corrections: Benefits, Limitations, and Implementing Considerations* (2014), available at <http://nicic.gov/library/files/029609.pdf> (“NIC Report”); *see also* Cindy Borden and Penny Richardson, *The Effective Use of Technology in Correctional Education*, John Jay College of Criminal Justice, Reentry Roundtable on Education at 14 (Spring 2008), available at <http://johnjay.jjay.cuny.edu/files/EffectiveUseofTechnology.pdf> (“The advantages of Internet-based technology in free society and prison schools are numerous. Immediate and unlimited access to countless high-quality programming, training, and resources would significantly increase educational opportunities and staff development. Connecting pre-release offenders to their families and communities through e-mail and video streaming could increase the probability of successful reentry. Practical experience with the Internet prior to release better prepares offenders for the ubiquitous nature of this resource.”); Lisa Harrison, *Prisoners and their Access to the Internet in the Pursuit of Education*, 39 Alt. L.J. 3 (2014) (reviewing prisoner access to the Internet in Australia and concluding that access to the Internet should be a priority both as a means to reduce recidivism and as an important matter of human rights); Anne Pike and Anne Adams, *Digital exclusion or learning exclusion? An ethnographic study of adult male distance learners in English prisons*, Research in Learning Technology, v. 20, Dec. 2012, available at <http://www.researchinlearningtechnology.net/index.php/rlt/article/view/18620> (surveying access to education technology in England and stating that technology-enhanced distance learning is perceived by many to be a lifeline in a desolate environment); JaPaula Kemp and Marcia Johnson, *The Effect of Educating Prisoners*, 7 U. Pa. J.L. & Soc. Change 1 (2003), available at <http://scholarship.law.upenn.edu/jlasc/vol7/iss1/2> (new technology makes distance education a viable alternative for education at correctional institutions at a lower cost than traditional education programs).

visiting hours and expanding visiting opportunities, supporting the mental health and institutional adjustment of the incarcerated, facilitating reentry planning, and reducing recidivism and increasing public safety.<sup>39</sup> Other organizations have identified inmate access to technology, “which is increasingly required for educational programs and reentry preparation,” as a key driver for correctional institutions addressing innovation in facility operations and population services.<sup>40</sup>

It is incentive regulation (such as the use of backstop rate caps)<sup>41</sup> that is the best way to encourage innovation and development, not rates set at cost (or below cost) with nothing more to offer. Incentive regulation “is more likely to help strengthen the competitiveness of American industry in domestic and international telecommunications markets, and, most importantly, help ensure that consumers share in the benefits of the information age through lower rates and a wide array of high quality services.”<sup>42</sup> In addition to lower rates, consumers “receive other benefits as a result of incentive regulation implemented through price caps” such as new “innovations that result in consumers enjoying a wider range of high quality services at cost-effective prices. . . . The incentives for greater efficiency and innovation established by price caps should provide direct and indirect benefits for society as a whole.”<sup>43</sup> When rate caps are set at the correct amount, carriers are encouraged to move prices “to economically efficient levels, to reduce costs, to invest efficiently in new plant and facilities, and to develop and deploy innovative service offerings.”<sup>44</sup>

Economic theory supports the Commission’s long-standing position on innovation and deployment of new technologies, and the need for ICS rate caps to be set at appropriate levels. There is no question that increased profit leads to growth in capital investment and innovation, especially in the face of rapidly changing telecommunications technology and services.<sup>45</sup>

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<sup>39</sup> NIC Report at 9.

<sup>40</sup> Brian A. Jackson et al., *Fostering Innovation in Community and Institutional Corrections: Identifying High-Priority Technology and Other Needs for the U.S. Corrections Sector*, RAND Corporation, at xvii, 28 (2015), available at [http://www.rand.org/pubs/research\\_reports/RR820](http://www.rand.org/pubs/research_reports/RR820); see also Lois Davis et al., *How Effective Is Correctional Education, and Where Do We Go from Here? The Results of a Comprehensive Evaluation*, RAND Corporation, at xix-xx (2014), available at [http://www.rand.org/pubs/research\\_reports/RR564](http://www.rand.org/pubs/research_reports/RR564) (discussing that one of the major trends that will shape the future of work in the 21st century is the growing role of information technology, with technological change resulting in an increased demand for a skilled workforce, but noting that in 26 states inmate students lack access to any Internet technology); Lois Davis et al., *Evaluating the Effectiveness of Correctional Education: A Meta-Analysis of Programs That Provide Education to Incarcerated Adults*, RAND Corporation, at xvii (2013), available at [http://www.rand.org/pubs/research\\_reports/RR266](http://www.rand.org/pubs/research_reports/RR266) (analyzing prior studies on correctional education and stating that computer-assisted instruction is potentially less costly to administer than traditional instruction and that the effects of newer technologies “may potentially outstrip” those reviewed in earlier studies of computer-assisted learning).

<sup>41</sup> See GTL January 2015 Comments at 5-7 (discussing rate caps and incentive regulation).

<sup>42</sup> *Policy and Rules Concerning Rates for Dominant Carriers*, 4 FCC Rcd 2873, ¶ 2 (1989) (“1989 Order”).

<sup>43</sup> *1989 Order* ¶ 43.

<sup>44</sup> *Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation*, 12 FCC Rcd 2259, n.20 (1997).

<sup>45</sup> Siwek/Holt Comments at 1-2; see also Gary Biglaiser & Michael Riordan, *Dynamics of Price Regulation*,



Economists believe “technological progress lowers both capital equipment and operating costs,” and as a consequence, regulated pricing at the optimal level reflects the value of future technological improvements.<sup>46</sup> In other words, one goal of rate regulation is to encourage innovation in order to drive future costs down. Innovation generally comes from investment in research and development, which requires ample revenue generation above operating and other expenses because companies rely on cash flow for investment spending.<sup>47</sup>

When ICS rate caps are set too low and site commissions remain unconstrained, as contemplated by the FCC Proposal, the introduction of new and innovative technologies for the benefit of inmates simply will not be possible. In economic parlance, the term “intertemporal” refers to how current decisions affect what options become available in the future - investment by a telecommunication carrier might be viewed as an “intertemporal” cross-subsidy in which installation of a new technology may require current revenue streams in order to attain its value in the future.<sup>48</sup> When the ICS rate cap is set too low, however, revenue streams will not be available for investment in future innovation. In this regard, pricing flexibility is critical for maintaining efficient intertemporal cross-subsidization. The rate caps for ICS must be set at a level that protects users from paying exorbitant rates for service, but are sufficiently high to support investment in future innovation. Concurrently, the existing site commission system must be modified; unconstrained site commissions hinder investment by diverting cash flow away from research and development, and thus from innovation.

## **II. THE PROPOSED IMPLEMENTATION SCHEDULE FAILS TO ADDRESS THE REALITY OF THE ICS MARKETPLACE**

The FCC Proposal indicates that the new rate caps and ancillary charge reforms will go into effect 90 days from the effective date of the FCC’s decision. While GTL has advocated for a 90-day transition period in the past, it consistently has said that the implementation of ICS rate reductions and ICS provider-proposed changes to ancillary charges must be phased-in simultaneously with reforms to the existing site commission system.<sup>49</sup> Given that the FCC Proposal states that the FCC will take no affirmative action to address site commissions, ICS providers would require substantially more time to determine whether they can continue to provide ICS under the new rate caps and then attempt to renegotiate their existing contracts.

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31:4 RAND Journ. of Econ. 744-767 (Winter 2000) (hereinafter “Biglaiser & Riordan”).

<sup>46</sup> Siwek/Holt Comments at 2; Biglaiser & Riordan at 745.

<sup>47</sup> Siwek/Holt Comments at 2; *see also*, e.g., Bronwyn H. Hall & Josh Lerner, *The Financing of R&D and Innovation*, 1 Handbook of the Economics of Innovation (2010) 609-639.

<sup>48</sup> Siwek/Holt Comments at 2; *see also* Laffont, Jean-Jacques, and Jean Tirole, *Competition in Telecommunications*, Cambridge, Mass: MIT Press, 2000 at 145-146 (“Cross-subsidies may also have an intertemporal dimension through the depreciation of investment expenditures. For example, a few years ago it was argued that U.S. local exchange carriers could install a fiber-optic network that was then useless in providing plain old telephone services but would later become a valuable asset when introducing new and innovative services such as interactive TV and video on demand. To the extent that the investment is (partly) depreciated before the new services are introduced, there may be a cross-subsidy from (current) regulated services to (future) unregulated ones.”).

<sup>49</sup> *See*, e.g., GTL January 2015 Reply Comments at 20-21; GTL April 3 Letter at 17-18.

GTL currently provides ICS under hundreds of contracts with correctional facilities, and the company's business plans and its day-to-day operations are predicated on the assumptions that were contemplated and agreed to when those contracts were executed. Many of those contracts require GTL to pay site commissions on individually tailored terms and conditions. If the FCC Proposal is adopted, however, GTL will not be able to recover the expense associated with the payment of site commissions through the below cost or at cost ICS per-minute rates.

The drastic reduction in interstate and intrastate rates that will result if the FCC Proposal is adopted, without corresponding modifications to the existing site commission regime, will be devastating because site commission payments are a primary component of the contracts. In addition, the services chosen by prison administrators and their budgetary decisions are reflected in the contracts, and the agreed-upon ICS pricing, to a large extent, is determined based on the terms of the individual services required by each correctional facility and the costs of providing the requested services to the specific facility. The FCC Proposal, if adopted, will make it impossible for GTL to meet its current obligations to pay site commissions and will otherwise frustrate the foundation upon which the contractual bargains were struck and could negatively impact public safety.

Despite the FCC's apparent belief that GTL and other ICS providers can simply voluntarily renegotiate their existing contracts,<sup>50</sup> the process of renegotiating hundreds of contracts with hundreds of customers over a 90-day period would be an impossible task.<sup>51</sup> Renegotiating these complex contracts with state and local agencies, if possible at all, will take significantly longer than 90 days.

Pursuant to Section 1.1206(b) of the FCC's rules, a copy of this notice is being filed in the appropriate docket.

Please contact us if you have any questions regarding this matter.

Respectfully submitted,

*/s/ Chérie R. Kiser*

Chérie R. Kiser

Counsel for Global Tel\*Link Corporation

Attachment

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<sup>50</sup> *ICS Order and First FNPRM* ¶ 102.

<sup>51</sup> WC Docket No. 12-375, Petition of Global Tel\*Link For Stay Pending Judicial Review, Yow Declaration ¶ 10 (filed Oct. 30, 2013) (estimating that renegotiation would require more than 10 person hours per contract, and more than 5000 person hours total).

cc (via e-mail): Chairman Tom Wheeler  
Commissioner Mignon Clyburn  
Commissioner Jessica Rosenworcel  
Commissioner Ajit Pai  
Commissioner Michael O’Rielly  
Jonathan Sallet  
Sarah Citrin  
Richard D. Mallen  
Daniel Alvarez  
Rebekah Goodheart  
Travis Litman  
Nicholas Degani  
Amy Bender  
Madeleine Findley  
Pamela Arluk  
Lynne Engledow  
Rhonda Lien  
Bakari Middleton  
Thomas Parisi  
Gil Strobel

## Comments on Wheeler/Clyburn ICS Proposal

Stephen E. Siwek and Christopher C. Holt  
*Economists Incorporated*  
October 10, 2015

On September 30, 2015, the FCC Chairman Wheeler and FCC Commissioner Clyburn released an inmate calling service (“ICS”) proposal that will be subject to a vote by the full Commission on October 22, 2015.

### Site Commissions

The proposal falls short of directly reforming the site commission structure that has been the gravamen of this proceeding all along. Rather, the proposal notes that it “[e]xcludes the cost of site commissions in establishing the rate caps and strongly discourages the use of site commissions.”<sup>1</sup>

The issue of reforming site commissions represents the core of the economic argument propounded by Economists Inc.—ICS providers facing a high site commission burden tend to pass this burden through to end users, and reducing the site commission burden is therefore highly likely to confer lower downstream prices. Indeed, as previously noted, correctional facilities in states that have imposed regulation on site commissions have experienced significantly lower downstream prices for ICS.<sup>2</sup>

The continuation of site commissions, on the other hand, keeps upward pressure on downstream prices as ICS providers likely will still be required to commit significant portions of their revenue to correctional facilities as part of the bidding process. Simple economics suggests that it is less likely that prices will drop below the imposed rate caps in a world where site commissions are not directly reformed (relative to one where site commissions *are* directly reformed).<sup>3</sup> In other words, failing to directly reform site commissions is a departure from the market-based approach originally proposed by the FCC.<sup>4</sup>

Moreover, an ICS provider’s incentive to lower costs vis-à-vis a rate cap may be diminished if that provider is also committed to a site commission arrangement. In this regard, the presence of site commissions may upset a traditionally intended result of rate cap regulation,

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1. See Chairman Wheeler and Commissioner Clyburn *Fact Sheet: Ensuring Just, Reasonable and Fair Rates for Inmate Calling Services* (rel. Sept. 30, 2015), available at <https://www.fcc.gov/document/fact-sheet-ensuring-just-reasonable-fair-rates-inmate-calling>.

2. See Declaration of Stephen E. Siwek and Christopher C. Holt In Support of Comments of Global Tel\*Link Corporation on Second Further Notice of Proposed Rulemaking, Jan. 12, 2015 at note 8.

3. See, e.g., Reply Declaration of Stephen E. Siwek and Christopher C. Holt In Support of Reply Comments of Global Tel\*Link Corporation on Second Further Notice of Proposed Rulemaking, Jan. 27, 2015 ¶ 8, note 10.

4. See FCC Second FNPRM ¶ 6 (“we seek comment on moving to a market-based approach to encourage competition in order to reduce rates to just and reasonable levels and to ensure fair but not excessive ICS compensation”).

which is to incentivize carriers to lower costs. Economists Gary Biglaiser and Michael Riordan have noted that “technological progress lowers both capital equipment and operating costs,” and that as a consequence of this, optimal regulated pricing reflects the value of future technological improvements.<sup>5</sup> In other words, one goal of price regulation is to encourage innovation in order to drive future costs down. Innovation is generally borne out of investment into research and development, which requires sufficient revenue generation above operating and other expenses. It has been established in the economics literature that firms rely on cash flow for investment spending.<sup>6</sup> Investment in a telecommunications carrier’s network might also be thought of as an intertemporal cross-subsidy: installation of a new technology, for example, may require current revenue streams in order to attain its value in the future.<sup>7</sup>

## Comparison of Proposed Caps

Table 1 compares the overall industry costs per minute within the facility categories designated in the September 30, 2015 Fact Sheet. As noted below, these categories are broader than those presented by the FCC in its mandatory cost collection. Based on this table, it appears that the FCC arrived at its proposed rate caps roughly by taking the industry average costs per minute of use (“MOU”) and rounding up to the nearest penny.<sup>8</sup>

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5. Gary Biglaiser & Michael Riordan, *Dynamics of Price Regulation*, 31:4 RAND Journ. of Econ. 744-767 (Winter 2000) [hereinafter *Biglaiser & Riordan* (2000)] at 745.

6. See, e.g., Bronwyn H. Hall & Josh Lerner, *The Financing of R&D and Innovation*, 1 Handbook of the Economics of Innovation (2010) 609-639.

7. Laffont, Jean-Jacques, and Jean Tirole. *Competition in Telecommunications*. Cambridge, Mass: MIT Press, 2000 at 145-146 (“Cross-subsidies may also have an intertemporal dimension through the depreciation of investment expenditures. For example, a few years ago it was argued that U.S. local exchange carriers could install a fiber-optic network that was then useless in providing plain old telephone services but would later become a valuable asset when introducing new and innovative services such as interactive TV and video on demand. To the extent that the investment is (partly) depreciated before the new services are introduced, there may be a cross-subsidy from (current) regulated services to (future) unregulated ones.”).

8. In some cases the rate cap is above or below the average costs reported for a given year. The difference between the rate cap and average industry cost within a size category ranges from \$0.001 to \$0.021 in absolute terms.

TABLE 1: FCC PROPOSED RATE CAPS VS. OVERALL AVERAGE COSTS PER MOU,  
PREPAID/DEBIT

FCC Proposal Category	FCC Proposed Rate Cap	Costs per MOU
<b>2012</b>		
Jails 0 to 349	\$0.22	\$0.208
Jails 350 to 999	\$0.16	\$0.150
Jails 1000+	\$0.14	\$0.137
Prisons	\$0.11	\$0.102
<b>2013</b>		
Jails 0 to 349	\$0.22	\$0.219
Jails 350 to 999	\$0.16	\$0.161
Jails 1000+	\$0.14	\$0.149
Prisons	\$0.11	\$0.098
<b>2014</b>		
Jails 0 to 349	\$0.22	\$0.216
Jails 350 to 999	\$0.16	\$0.139
Jails 1000+	\$0.14	\$0.132
Prisons	\$0.11	\$0.090

Source: Carrier cost data as submitted to FCC; FCC Fact Sheet (rel. Sept 30, 2015)

In its original data collection request, the FCC required that costs be reported across seven categories, rather than the four shown in Table 1. Because Table 1 represents overall averages across all carriers within four broad facility categories, much of the variation in costs per minute is not apparent. However, a cap placed squarely at the industry average cost per minute means that a large portion of the ICS industry (in terms of MOUs) will face costs in excess of this cap. Table 2 addresses this question by calculating the number of MOUs associated with costs per minute that are above the proposed FCC rate caps when those costs per minute are calculated by carrier and facility size category (using the FCC's original size category designations). **By this measure, 40 percent (40%) of all debit/prepaid MOUs in 2013<sup>9</sup> were associated with costs in excess of the FCC's proposed cap.**

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9. For the purposes of discussion, we refer to 2013 data because it is the most recent full year of actual data provided in the data collection (2014 data was extrapolated by parties at the time of mandatory cost collection submissions). In its review of the cost data for the FCC Second FNPRM, the FCC used a combination of 2012 and 2013 actual data (*see* ¶ 49). For completeness, data from all cost submission years (2012 through 2014) are presented in Appendix 1.

TABLE 2: PORTION OF ICS INDUSTRY FACING COSTS IN EXCESS OF PROPOSED RATE CAPS, DEBIT/PREPAID 2013

<b>FCC Data Collection Category</b>	<b>MOUs over FCC Proposed Rate Cap</b>	<b>MOUs over JPRP Cap</b>	<b>Total MOUs</b>	<b>Proposed FCC Cap</b>	<b>Average Costs per MOU</b>
Jails 0 to 99	49,984,814	57,443,622	83,190,954	\$0.22	\$0.27
Jails 100 to 349	138,369,770	138,369,770	303,887,270	\$0.22	\$0.20
Jails 350 to 999	200,773,811	6,964,984	557,842,765	\$0.16	\$0.16
Jails 1,000+	788,153,536	1,273,737	1,250,840,716	\$0.14	\$0.15
Prisons 1 to 4,999	4,186,702	4,186,702	114,811,423	\$0.11	\$0.07
Prisons 5,000 to 19,999	392,675,935	0	444,832,010	\$0.11	\$0.12
Prisons 20,000+	118,180,379	0	1,427,481,912	\$0.11	\$0.09

Source: Carrier cost data as submitted to FCC; FCC Fact Sheet (rel. Sept 30, 2015)

Note: We first calculated each carrier's average costs per minute (as submitted to the FCC) within each FCC size category and year. This measure was then used to calculate how many MOUs reported by each carrier for a given facility size were associated with average costs in excess of the proposed FCC and Joint Provider Reform Proposal caps. Costs per minute are calculated as all direct and common costs per revenue producing MOU.

Table 2 also presents the number of MOUs associated with costs in excess of the Joint Provider Reform Proposal ("JPRP") proposed rate cap for debit/prepaid calls. Note that in a previous filing, Economists Incorporated estimated that in 2013, only three carriers—those making up a 0.5% share of the ICS market—showed costs in excess of the proposed JPRP cap.<sup>10</sup> Although Table 2 and this previous estimate may seem in opposition to each other, they are not. Table 2 presents averages calculated at the facility-size and carrier level based on the FCC's category designations. A given carrier will have costs above and below its average cost per minute based on variations across facilities. Thus, an average over all of a carrier's facilities (such as the average presented in the August 10, 2015 filing) will yield a different percentage of MOUs than averages taken at a more granular level.

10. See Stephen E. Siwek and Christopher C. Holt, Further Comments with Regard to Rate Cap Proposals, August 10, 2015 at 4.

## Appendix 1: Cost Comparison 2012-2014

Table A1 presents the portion of MOUs in the overall ICS industry associated with costs in excess of the FCC proposed rate caps.<sup>11</sup>

TABLE A1: PORTION OF ICS INDUSTRY FACING COSTS IN EXCESS OF FCC PROPOSED RATE CAPS, DEBIT/PREPAID 2012-2014

FCC Data Collection Category	MOUs w/Costs Above FCC Proposed Rate Cap	% of Total MOUs	MOUs w/Costs Above JPRP Cap	% of Total MOUs	Total MOUs	FCC Proposed Rate Cap	Average Costs per MOU
<b>2012</b>							
Jails 0 to 99	45,778,878	62%	45,778,878	62%	74,029,222	\$0.22	\$0.26
Jails 100 to 349	124,680,012	45%	124,680,012	45%	276,490,153	\$0.22	\$0.19
Jails 350 to 999	39,125,989	7%	14,335,431	3%	528,852,329	\$0.16	\$0.15
Jails 1,000+	697,859,808	59%	6,776,670	1%	1,174,356,025	\$0.14	\$0.14
Prisons 1 to 4,999	26,320,615	26%	0	0%	100,462,445	\$0.11	\$0.08
Prisons 5,000 to 19,999	251,206,334	64%	0	0%	395,498,940	\$0.11	\$0.10
Prisons 20,000+	679,073,710	63%	0	0%	1,073,817,462	\$0.11	\$0.10
<b>2013</b>							
Jails 0 to 99	49,984,814	60%	57,443,622	69%	83,190,954	\$0.22	\$0.27
Jails 100 to 349	138,369,770	46%	138,369,770	46%	303,887,270	\$0.22	\$0.20
Jails 350 to 999	200,773,811	36%	6,964,984	1%	557,842,765	\$0.16	\$0.16
Jails 1,000+	788,153,536	63%	1,273,737	0%	1,250,840,716	\$0.14	\$0.15
Prisons 1 to 4,999	4,186,702	4%	4,186,702	4%	114,811,423	\$0.11	\$0.07
Prisons 5,000 to 19,999	392,675,935	88%	0	0%	444,832,010	\$0.11	\$0.12
Prisons 20,000+	118,180,379	8%	0	0%	1,427,481,912	\$0.11	\$0.09
<b>2014</b>							
Jails 0 to 99	61,412,340	79%	63,265,073	82%	77,611,852	\$0.22	\$0.32
Jails 100 to 349	32,990,911	10%	160,457,046	48%	335,373,959	\$0.22	\$0.19
Jails 350 to 999	303,544,365	52%	17,850,126	3%	584,233,121	\$0.16	\$0.14
Jails 1,000+	757,251,813	56%	9,038,329	1%	1,358,081,611	\$0.14	\$0.13
Prisons 1 to 4,999	3,975,434	2%	0	0%	169,802,093	\$0.11	\$0.08
Prisons 5,000 to 19,999	307,081,852	64%	0	0%	480,242,860	\$0.11	\$0.11
Prisons 20,000+	144,218,333	9%	0	0%	1,642,290,833	\$0.11	\$0.09
<b>Total 2012</b>	1,864,045,346	51%	191,570,991	5%	3,623,506,576	\$0.14	\$0.13
<b>Total 2013</b>	1,692,324,947	40%	208,238,815	5%	4,182,887,050	\$0.14	\$0.13
<b>Total 2014</b>	1,610,475,048	35%	250,610,574	5%	4,647,636,329	\$0.13	\$0.12

Source: Carrier cost data as submitted to FCC; FCC Fact Sheet (rel. Sept 30, 2015)

11. As in Table 2, average costs per minute are calculated for each carrier and facility size category. It is straightforward to perform the same calculation using the broader FCC size categories presented in the recent fact sheet. The total percentage of MOUs associated with costs that are in excess of the proposed FCC rate caps using the broader facility size designations is 54 percent, 29 percent, and 35 percent for 2012, 2013, and 2014 respectively.